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Supreme Court, U.S.
FILED

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NO.:_____

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID MORROW,

Petitioner,

vs.

DAIMLER/CHRYSLER CORPORATION and
AKIN FORD/CHRYSLER, INC. of WINDER,GEORGIA

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court of the United States
From Decision of the Supreme Court of Alabama

PETITION FOR WRIT OF CERTIORARI

DONALD G. MADISON
Attorney for Petitioner
418 Scott Street
Montgomery, Alabama 36104
(334) 263-4800

QUESTIONS PRESENTED FOR REVIEW

I. Whether Petitioner's Right to Trial by Jury as guaranteed by the 7th Amendment to the United States Constitution was violated by the decision of the Supreme Court of the State of Alabama where Petitioner's jury verdict was vacated by decision by the Alabama Supreme Court which ignored the Court's own standard of review for similarly situated litigants thereby invading the province of the jury, thereby also violating Petitioner's due process and equal protection rights under the Fourteenth Amendment to the Constitution.

"(A) Standard of Review of Alabama Supreme Court of review of Motion for Judgment as a matter of law.

The standard of review applicable to a ruling on a [renewed] motion for [a JML] is identical to the standard used by the trial court in granting or denying a motion for [a JML]. Thus, in reviewing the trial court's ruling on the motion, we review the evidence in the light most favorably to the nonmovant, and we determine whether the party with the burden of proof has produced sufficient evidence to require a jury determination.

... In ruling on a [renewed] motion for [a JML], the trial court is called upon to determine whether the evidence was sufficient to submit a question of fact to the jury; for the court to determine that it was, there must have been "substantial evidence before the jury to create a question of fact. Substantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial-judgment can reasonably infer the existence of the fact sought to be proved.

American Nat'l Fire Ins. Co. v. Hughes, 624 So. 2d 1362, 1366-67 (ala. 1993) (citations omitted). Mack Trucks, Inc. v. Witherspoon, 867 So. 2d 307, 308 (Ala. 2003)."

With all due respect, the Alabama Supreme Court disregarded and/or ignored substantial evidence submitted at trial by Petitioner and instead construed the facts in Akin's and DaimlerChrysler's favor contrary to the court's acknowledged standard of review.

I. (i) Petitioner presented facts that express term of warranty was that the problem would be repaired within a reasonable time not to exceed thirty days, and that both Akins and Chrysler failed to repair within thirty days. Petitioner showed that Chrysler did not have a repair procedure for the warrantied problem until four (4) months after the problem was reported and, therefore, could not repair within warranty period.

(ii) That Alabama Supreme Court relied on erroneous facts in stating Petitioner was offered a new car and a new warranty.

(iii) The Alabama Supreme Court made a finding of apparent authority in an employee of Akin's to support the erroneous fact cited in (ii) above without any evidence to support implied nor apparent authority in the employee of Akin's.

II. The Alabama Supreme Court disregarded the substantial evidence presented by Petitioner on failure of essential purpose under express and implied warranty claims.

III. The Alabama Supreme Court disregarded the substantial evidence presented by Petitioner on implied warranty of merchantability claim. (See also dissent of Justice Johnstone on pages 13 through 16 in Appendix C.)

PARTIES TO THE PROCEEDING

Petitioner: David Morrow

Counsel for Petitioner:
Donald G. Madison, Esquire
418 Scott Street
Montgomery, Alabama 36104

Respondents: Daimler/Chrysler Corporation
Akins Ford/Chrysler, Inc.

Counsel for Respondents:
James F. Walsh, Esquire
Carey B. McRae, Esquire
ADAMS and REESE/LANGE SIMPSON, L.L.P.
2100 3rd Avenue, North, Suite 1100
Birmingham, Alabama 35203

Matthew C. McDonald, Esquire
Kirkland E. Reid, Esquire
MILLER, HAMILTON, SNIDER & ODOM, L.L.C.
254 State Street
Mobile, Alabama 36603

Honorable Drayton Nabers, Jr.
Chief Justice
Alabama Supreme Court
300 Dexter Avenue
Montgomery, Alabama 36104-3741

Honorable Truman M. Hobbs, Jr.
Circuit Judge
Fifteenth Judicial Circuit of Alabama
251 South Lawrence Street
Montgomery, Alabama 36104

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, David Morrow, respectfully petitions for a Writ of Certiorari to review a judgment of the Supreme Court of the State of Alabama.

JURISDICTION

United States Supreme Court Rules 10(b), 10(c)

Date of Entry of Judgment by the State of Alabama Supreme Court: August 27, 2004

28 U.S.C. '§ 1257
28 U.S.C. § 1207
28 U.S.C. § 2101

United States Constitutional provisions –

AMENDMENT VII {1791}.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT XIV {1868}.

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws...

OPINIONS BELOW

1. Jury verdict finding in Petitioner's favor against Akin Chrysler Plymouth of Winder, Georgia and DaimlerChrysler Corporation with jury assessment of compensatory damages of $93,500.00.

2. Trial Court's Final Order dated June 27, 2003, (Denying Defendants' Motion for New Trial or Judgment Notwithstanding the Verdict and awarding attorney fees to Petitioner).

3. Opinion of the Alabama Supreme Court reversing the case and vacating the jury verdict dated May 7, 2004.

4. Order of Alabama Supreme Court overruling with no opinion the Petitioner's Application for Rehearing.

5. Alabama Supreme Court Order overruling with no opinion the denial of Petitioner's cross appeal.

STATUTES INVOLVED

Title 7-2-314, 1975 Code of Alabama

STATEMENT OF THE CASE

David Morrow filed his Complaint against Akins Chrysler/Plymouth of Winder, Georgia, (Akin) and the DaimlerChrysler Corporation (Chrysler) on or about October 27, 1998 (C-1-CV1-138). In addition to Morrow's claims of breach of express and implied warranty; Morrow requested attorney's fees.

The Court dismissed Morrow's fraud claims when it granted Akins' and Chrysler's Motion for Summary Judgment on the fraud claims. The jury trial commenced (V7-R1-58). After three days of testimony, the jury verdict was read (C10-V10-Pg. 563), wherein the jury found in favor of the Petitioner Morrow against Respondent Akins Chrysler/Plymouth of Winder, Georgia and DaimlerChrysler Corporation and assessed compensatory damages in the amount of ninety-three thousand five hundred dollars.

Morrow was awarded attorney fees and costs by Order issued by The Honorable Truman M. Hobbs, Jr., Circuit Judge and dated May 15, 2003. The Final Order was entered subsequent thereto on June 27, 2003 (C-7-1275-1278). The Appellees filed a Notice of Appeal (C7-1279-1287).

Morrow filed his Cross-Appeal (C7-1288-1298).

The Supreme Court for the State of Alabama reversed the case stating that the trial court should have granted judgment as a matter of law by Opinion dated May 7, 2004.

Morrow filed an Application for Rehearing contending therein that the Alabama Supreme Court, by substituting its interpretation of the facts to that of the jury and in disregarding his own standard of review violated Morrow's Seventh Amendment rights to trial by jury as Morrow's due process and equal protection rights under 14th amendment.

STATEMENT OF FACTS

COMES NOW, David Morrow (hereinafter referred to as Morrow) and submits the following facts in support of his Petition for Writ of Certiorari.

Morrow's business was characterized as the "less than truck load freight." This was where he would haul anywhere from one piece to four or five pieces.

Morrow wanted to buy a new truck with a diesel engine with a manual transmission so that he could get better fuel economy. He first had a conversation with Akins salesman, Eric Shepherd. This was at the end of March or first of April 1997 (R-1-105). They discussed the type rear-end the truck had (3.54 ratio then a 4.10 ratio rear-end as Morrow's business required him to pull a gooseneck trailer hauling signs). Mr. Shepherd recommended the 4.10 rear-end. Morrow paid the difference to have the 4.10- rear-end installed.

Mr. Morrow stated that he made it very clear that he would be utilizing his truck in his business where he utilized a gooseneck

forty foot trailer to haul signs; and that Mr. Shepherd, as Akins' employee, understood this from their discussions (R-1-109).

Morrow testified that the sales price of the truck was thirty thousand nine hundred dollars. Mr. Morrow stated that he understood that he got a three-year, thirty-six thousand mile bumper-to-bumper warranty (R-1-112).

Mr. Morrow had the truck approximately one month when the first problem arose. The transmission locked up on him at the second Prattville, Alabama, exit on the interstate. He was transporting a SENECO sign (R-1-116). The entire transmission was removed and replaced with a new transmission. This repair was performed on April 29,1997 (R-1-117).

Shortly after this repair, Mr. Morrow began noticing that the truck exhibited a bucking and jerking sensation when you were driving around fifty-five miles per hour. The bucking and jerking was,

> "similar to someone who does not know how to drive a stick shift car when they take off from a red light and the car...(making noises) back and forth. It does that kind of motion at fifty-five miles per hour (R-1-119). The jerking and bucking was intermittent; it may not do it for 3-4 days or it may do it in less than two miles in between the time that it occurs. It did not do it unless you were pulling a trailer" (R-1-119).

Mr. Morrow thought at first that the jerking and bucking was intermittent. However, the problem continually worsened. Mr. Morrow then clarified the problem (V1-123):

> "A.Well, the next trip I took the bucking and jerking sensation was – it was apparent to me that it wasn't just an intermittent problem, and it wasn't anyway that I was driving the truck. Something was wrong with the vehicle..."

After realizing the jerking and bucking was not going to go away, Mr. Morrow took the truck back to Akins with a trailer "so I could get somebody to look at it and tell me what was wrong with it so we could fix it" (R-1-123, 124).

Morrow testified that the mileage was eighteen thousand three hundred and thirty-one miles (R-1-124). The date was June 17, 1997, only two and a half months after Morrow had purchased the truck and within the thirty-six thousand mile/three year warranty period. He had Akins check the truck for several different problems on this date; the primary reason though was to check on the jerking and bucking (R-1-126).

Mr. Morrow testified that he had mechanical experience in the past where he worked as a boat mechanic. His duties were that of an overall mechanic. He did engines, outdrives, steering systems, everything (R-1-127).

As to the bucking and jerking, Mr. Morrow, stated that on June 17, 1997, at eighteen thousand three hundred thirty-one miles, when he presented the truck to Akins for the problem that the Akins' shop foreman, Rick Bowers rode with Morrow to check the jerking and bucking. Morrow testified that when the jerking and bucking began that Mr. Bowers:

> "told me, well this is the sixth or seventh one I have seen in here doing this and we have tried to put stiffer springs on the accelerator linkage and so far nothing has worked but we've made Chrysler aware that we're having a problem. He said they were working on a solution and that as soon as he found out something, he would let me know." (R-2-128).

Mr. Morrow took the truck back to Akins subsequent to the June 17, 1997, eighteen thousand three hundred thirty one miles reporting of the problem. Morrow testified that while at Akins on October 14, 1997:

> "I had asked the service writer if they had figured out how to fix the jerking and bucking problem yet... I think his name was Rick Gonzalez (R-1-139, 140)... I asked him if they had come up with a way to fix the bucking and jerking because I -- at the time I was under the impression that's what was tearing the transmission up, and I never got any responses on the bucking and jerking but he did tell me they had designed a new nut that was supposed to keep the fifth gear from falling off." (R-1-140).

Mr. Morrow testified that he took the truck back to Akins on November 4, 1997, a little over two weeks after the October 14, 1997 repair (R-1-141). Mr. Morrow testified concerning his problem of the jerking and bucking and he "asked them again and I still did not get a response."(R-1-44).

Mr. Morrow's deposition testimony concerning this conversation (C-724 and C-725), stated as follows:

> "... It was one of the visits that once it had started--- sometime had started passing by and they still hadn't called me and told me anything about fixing my surging problems, and every time that I would carry the truck in there I would always ask Rick about, had they come up with a cure for this problem yet. And he never seemed to—he just wouldn't respond. So I called the service manager, and I can't remember what his name is. I think his last name is Smith. John Smith I think is what his name is.
>
> I called the service manager himself the guy in charge of the service department, explained to him what problem I was having, and asked him if there was anything he could do to help me out. And his only suggestion was he told me that I could trade the truck and get another Dodge truck, but he couldn't guarantee me that the next truck wouldn't possibly do the exact same thing the truck I've got now is doing."

This conversation is what the Alabama Supreme Court misconstrued as Chrysler offering a new truck and a new warranty.

When further describing the jerking and bucking, Mr. Morrow testified that he noticed rub marks from where the motor rubbed on the insulation on the hood from the problem (R-1-146). Mr. Morrow then gave examples as to how violent the bucking and jerking was. He stated,

> "Well, the jerking and bucking was so violent that the rearview mirrors would flop back and forth a little bit and the

radio antennae would whip back and forth in a motion like that".

He further testified that if you had a drink or a cup of coffee in the coffee holder, that "it would spill it if did not completely fall out of the drink holder altogether" (R-1-148). Mr. Morrow testified to the dangerous condition that the truck's bucking and jerking caused. He testified that,

> "Somewhere along the line, I noticed that the fifth wheel -- the goose neck ball that was mounted in the bed of the truck -- we were up underneath the truck changing the oil and stuff in it one day when I noticed where the nut was welded into the brace under there, that the weld was broken all the way around the nut" (R-1-148).

Mr. Morrow attributed this dangerous condition as being caused by the bucking and jerking (R-1-148). Mr. Morrow then testified that he carried the truck back to Airport Trailer Sales to have the fifth wheel weld repaired. He testified that it was not long thereafter that the weld broke again because of the bucking and jerking. Mr. Morrow then testified,

> "Well, the first particular occasion I carried it in, they re-welded the nut back under the bottom of it. Then we were inspecting it again and noticed the weld had broken again. That's when I pretty much just said, well this has gotten to the point where I'm about to get somebody killed when this trailer leaves the back of this truck so I just parked the truck and quit using it." (R-1-149).

He testified that, "this was when I had to go rent me a truck" to carry on his business (R-1-150). He testified that he was not in good financial shape; he did not have a lot of extra money; that he did not qualify for financing for another vehicle (his business was only a year and a half old); he still had the outstanding liability on the Dodge truck for which he was paying $630.00 per month (R-1-151).

Mr. Morrow testified that he never quit making his monthly payments on the Dodge truck (R-1-152).

Mr. Morrow testified that this was around January or February of 1998, that he parked the truck because of the dangerous condition. He testified that in order to continue his business he had to go lease a tractor trailer because no other type truck was available (R-1-153). Mr. Morrow further testified that he was required to also lease a trailer because his trailer was not compatible with the tractor (R-1-154).

Mr. Morrow then read from his DaimlerChrysler CAIR Report (R-1-170). The Report was dated August 13, 1997. Morrow confirmed that the Report related to his jerking and bucking problem. Mr. Morrow confirmed that the CAIR report confirms Chrysler received the letter from his then attorney regarding the jerking and bucking, (R-1-173) and that Chrysler therefore had notice of the problem. Mr. Morrow then confirmed that after the CAIR report entry was made concerning the jerking and bucking (August 13, 1997), he took his vehicle back to Akins on at least two additional occasions subsequently thereto (R-1-174).

Mr. Morrow was shown Plaintiff's Exhibit 31, which was a STAR Hotline Communication, produced approximately one week before trial to the Plaintiff. The STAR hotline was an e-mail type system set up between Chrysler and its dealers, which in this case was Akins. Mr. Morrow identified the date of the STAR entry as February 13, 1997. Mr. Morrow stated that this was two months prior to his purchasing his truck from Akins (R-1-179).

The Akins/Chrysler STAR communication read:

> "It says vehicle mileage fifty three twenty nine. Model year 1997; engine 5.9. It says, concern: Buck and surge at cruising speed pulling a fifth wheel trailer, 3.54 ratio gear in fifth gear. Twelve thousand pounds GVW of trailer. The Trailer was loaded. The bucking caused the trailer to come unhooked from the truck. The bed and tailgate heavy damage. Happens while cruising. Steady speed. Fifth wheel is approximately four inches forward of axle. Truck has camper." Then it says, "resolution, package: Transient customer. No fix at this time." (R-1-180).

The importance of this STAR report was that it was sent to Chrysler by Akins two months before Morrow purchased his truck and it confirmed the reason that Mr. Morrow had parked his truck (i.e. fear that the trailer would come off and the dangerous condition presented by his truck's fifth wheel welds breaking because of the jerking and bucking).

At (R-1-183), Mr. Morrow was asked why he started using the truck again in 2000. He responded, "I run out of money, I couldn't afford to keep renting a tractor and a trailer to do my job." Mr. Morrow confirmed that Plaintiff's Exhibit 9 was a good indicator of when he resumed using his truck in his business again. He testified "That's 2/3 of 2000" (he had ceased using the truck in his business in January or February 1998 but did use it for personal use thereafter). He had the vacuum pump replaced. again. He confirmed Exhibit 9 was around the time he quit using the truck in his business (at 67,900 miles). Morrow was shown Exhibit 9, which reports one hundred twenty-nine thousand seven hundred eighty-four miles on the odometer (2/3 of 2000). Mr. Morrow testified that the repair performed after Exhibit 9 was to repair the damaged speed odometer cable. It was after this repair that the odometer would run mileage even when you were sitting still or in neutral (R-1-184, 185).

Mr. Traylor, one of DaimlerChrysler's expert witnesses, testified that the Technical Service Bulletins (manufacturer's notice of availability of repairs for a problem) are not sent to the retail customers, thereby confirming that neither Chrysler nor Akins would have forwarded the TSBs to Morrow (R-2-346). Mr. Traylor then discussed the jerking and bucking. Mr. Traylor confirmed that he had seen the video two years previously, as well as the fact that he had actually ridden in Morrow's truck to experience the jerking and bucking. He was questioned,

> Q: "Is it severe?"
> A: "It is very severe in my opinion."
> Q: "Is it hard to even carry on a conversation while it is going on?"
> A: "Yes, it is, and well, it is just – it shakes really bad" (R-2-351).

At R-2-371, Mr. Traylor read from the warranty handbook and confirmed that the warranty handbook, in fact, discussed what was a reasonable time for Chrysler to repair under warranty. He confirmed that the warranty handbook defined reasonable time as being no longer than thirty days within which Chrysler should affect a warranty reported repair (R-2-370, 371). Mr. Traylor confirmed that the repairs were not made within the thirty-day period (R-2-373). Further, at (R-2-372) Mr. Traylor (Chrysler's own expert) confirmed that Mr. Morrow presented the problem to Akins at 18,331 miles, which was within the warranty (R-2-372).

Mr. William Campbell's testimony (another one of Chrysler's experts) commenced at R-2-414. Mr. Campbell was an engineer with Chrysler working in the power train division at the time. At R-2-428, 429. Mr. Campbell was questioned about his knowledge of the jerking and bucking. He stated (R-2-429) that he had been in one of the trucks which jerked and bucked. He stated,

> It is a very unsettling experience. It gets started with a rapid throttle movement and a back-off. Then it just goes into a resonance on its own. If you aren't strapped in, you can get thrown up and hit your head on the roof, or I can. I'm kind of tall."

At R-2-448, 449, additionally, Mr. Campbell discussed the three different defects Chrysler was aware of - all of which occurred with Mr. Morrow's truck. He confirmed that the first repair at 4,400 miles dealt with a problem that appeared only in a very few number of vehicles which he stated if his recollection was accurate, approximately a dozen. He confirmed that the jerking and bucking was also a separate problem which Mr. Morrow experienced with his truck. He identified the third problem Mr. Morrow experienced as the fifth gear nut back-off problem. This was the third defect that Chrysler was aware of, all comprising defects which Mr. Morrow experienced with his vehicle within the first forty-eight thousand (48,000) miles that Morrow owned the truck (the fifth gear nut back-off problem first occurring after the warranty expired). At that time, Chrysler had no fix for either the jerking and bucking (18,331 miles) nor the fifth gear nut back-off problem.

Mr. Morrow testified that approximately two months after he reported the jerking and bucking in June 1997, the fifth gear went out in the truck (R-1-132). He testified that he was just riding down the road in fifth gear and all of a sudden the engine revved up and it was as if it were in neutral. The effect of losing the fifth gear with the 410 rear end, you only have four gears and the truck would not travel but approximately fifty-five miles an hour. He stated that in his business, he traveled mostly interstate and that the speed limit on the interstate was always somewhere around seventy miles per hour (R-2-133). He stated that having to drive the truck at fifty-five miles per hour in fourth gear was not only not very timely, but it was very taxing on the truck to try to run at fifty-five miles per hour in fourth gear (R-1-134). His first fifth gear repair was made on September 17, 1997, Plaintiff's Exhibit 5. The mileage at that time was 47,183 miles (R-1-135, 136). He then testified that maybe three weeks to a month after that the fifth gear problem occurred again. He stated that he carried it back to Akins, which was Plaintiff's Exhibit 6. The date of that invoice was October 14, 1997 (R-1-138). The mileage was 55,411 miles. This repair was performed at Akins; they replaced the nut and washer on the fifth gear. Mr. Morrow stated that he questioned why the thing kept losing fifth gear (R-2-138). He stated that he was told him that they had designed a new nut that was supposed to hold the fifth gear on in place of the old nut and that they were going to have to put the new nut on the truck and that he should not have any more problems with the fifth gear (R-2-139). He testified (R-1-141) that the second fifth gear repair was less than twelve thousand miles from the prior fifth gear repair. He identified Plaintiff's Exhibit 7 as being on November 4, 1997, which was a little over two weeks after the other fifth gear repair was made. Akins also performed this repair. The mileage was sixty-one thousand nine hundred seventy-four miles. He did not have to pay for that repair because Akins said that it was covered under a MOPAR Warranty for parts and labor (R-1-141, 142).

Thereafter, Morrow had numerous repairs made to the fifth gear nut back-off problem where DaimlerChrysler concealed from Morrow the fact that they had no repair which would fix the fifth gear nut back-off problem. Morrow spent in excess of ten thousand dollars on fifth gear nut back-off repairs.

Mr. William Campbell testified concerning this problem.

A: "No, I had no way to test it."
Q: "And the problem was occurring in the '96 vehicles?"
A: "Some occurred in the '96 vehicles, yes."
Q: "And your testimony was that there was no change in design from the '96 to the '97's."
A: "No, there was not."
Q: "And I believe that you also testified that therefore it would have been likely that the fifth gear nut back-off problem would reveal itself in the '97's?"
A: "That's correct."

Mr. Campbell testified that the three nut repairs were the original nut, the stake nut and the clamp nut. He testified that the clamp nut was not established until December 1998. He testified that the dealers did not have those packages until December 1998. Mr. Campbell testified that the final implementation which fully corrected the fifth gear problem was the press fit bearing implementation which occurred in April 1999. (R3-444).

REASONS FOR GRANTING THE WRIT

THE STATE OF ALABAMA INCORPORATED THE RIGHT TO TRIAL BY JURY AND PRINCIPLES OF DUE PROCESS IN ITS CONSTITUTION.

(a) Article I

"Sec. 11. Right to trial by jury.

That the right of trial by jury shall remain inviolate."

(b)Article I

"Sec. 13. Courts to be open; remedies for all injuries; impartiality of justice.

> That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay."

THE ALABAMA SUPREME COURT INFRINGED ON MORROW'S RIGHT TO TRIAL BY JURY BY SETTING ASIDE THE VERDICT OF THE JURY.

> "[2-4] The power of a court to set aside a verdict is inherent and is essential to prevent irreparable injustice in every case where a verdict is wholly wrong..."
>
> "...In the exercise of this power courts should be careful not to infringe the right of trial by jury, and should bear in mind that it is the exclusive province of a jury to determine the credibility of witnesses to weigh the testimony, and find facts from that testimony... The foregoing being the principles by which a trial court should be controlled, it is to be observed that these principles apply with much greater force to the exercise of this power by an appellate court. When the presiding judge of a trial court refuses to grant a new trial, the correctness of the verdict is thereby strengthened.
>
> [6,7] ...Where, however, there is evidence on both sides, or when there is some evidence to support the verdict, it should not be set aside, because the verdict does not correspond with the opinion of the court as to the weight of the testimony, or because the verdict appears to be against the mere preponderance of the evidence. It is well established in this state that the decision of a trial court refusing to grant a new trial on the ground of the insufficiency of the evidence, or that the verdict of the jury is contrary to the evidence, will not be reversed unless, after allowing all reasonable presumptions of its correctness, the preponderance of the evidence against the verdict is so decided as to clearly convince the court that it is wrong and unjust."
> *International Harvester Co. Of America v. Donaldson,* 162 So. 566, 569 (Ala.)

Petitioner submitted substantial evidence of the breach of express warranty. The Alabama Supreme Court substituted their view on the evidence as opposed to the jury's and therefore invaded the province of the jury.

I. (i) THE EXPRESS WARRANTY TERM DEFINED THE TIME FOR PERFORMANCE ("WITHIN A REASONABLE TIME") AS THIRTY DAYS. MORROW PRESENTED SUBSTANTIAL EVIDENCE OF NOT ONLY BREACH OF THE EXPRESS TERMS OF THE WARRANTY, BUT ALSO AS TO BOTH TYPES OF FAILURE OF ESSENTIAL PURPOSE RECOGNIZED BY THE CASE LAW.

> "To recover on breach-of-express warranty claim, purchaser must show that warranty failed of its essential purpose, that either dealer refused to repair or replace malfunctioning component, or failed to do so within reasonable time."
> *Feil v. Wittern Group, Inc.*, 784 So.2d 302, 304 (Ala.Civ.App. 2000).

> "However, where no time is fixed in the agreement for remedying the defects, they must be remedied within a reasonable time, and an unsuccessful attempt to remedy the defect renders the seller liable on its warranty, and the buyer is not bound to allow continued attempts to correct the defect. See 77 C.J.S., Sales, ' 340, and cases cited."
> *Becker Roofing Co. V. Carroll*, 69 So.2d 295, 298 (Ala.)

> "Crux of all express warranty claims under Alabama version of Uniform Commercial Code UCC) is that goods did not conform to warranty. Code 1975, ' 7-2-313."
> *Ex Parte Miller*, 693 So.2d 1372, 1373 (Ala. 1997).

The express terms of the warranty were that Chrysler defined what a reasonable time is in its Warranty, which was that they would repair, "no later than thirty days". Morrow presented for the jerking and bucking problem at eighteen thousand three hundred thirty-one miles, two months after he bought it, and within the warranty. Not only did Chrysler and Akins not repair within thirty

days, the undisputed facts were that Chrysler did not even have a repair for the jerking and bucking until October 1997 (revised in December 1997), four months after the truck was presented. Chrysler could not repair at the time the truck was presented within the warranty period. There was a *prima facie* case of breach of express warranty presented to the jury. Additionally, it is undisputed that Morrow took the truck back to Akins on two additional occasions after first reporting the jerking and bucking. Morrow provided Akins and Chrysler the opportunity to repair and as repairs were made.

I. (ii) and (iii) THE ALABAMA SUPREME COURT MISCONSTRUED THE EVIDENCE AS TO MORROW BEING OFFERED A NEW TRUCK AND NEW WARRANTY, AS WELL AS THAT AN EMPLOYEE TO AKINS HAS AUTHORITY TO COMPROMISE MORROW'S CLAIM WITHOUT ANY EVIDENCE TO SUPPORT THE IMPLICATION NOR ANY FACT THAT AN AKINS' EMPLOYEE WAS ENTITLED TO ACT ON CHRYSLER'S BEHALF.

Morrow submitted in the Application for Rehearing his deposition testimony appearing in the record regarding the conversation he had with the service department employee of Akins. Morrow testified that a suggestion was made to trade in the truck, but that they could not guarantee that it would not do the same thing as the other six or seven trucks.

The Alabama Supreme Court misinterpreted the testimony at trial and stated in its Opinion that Morrow was offered a new truck and new warranty. There are no facts in the record supporting this holding. The Alabama Supreme Court ignored Morrow's testimony that the service department employee suggested Morrow could "trade in" his truck but that they could not guarantee the truck would not jerk and buck like the other six or seven trucks did.

Morrow understood this as not warrantying (guaranteeing) the jerking and bucking problem. Besides Morrow's deposition testimony clearly shows that he understood the discussion as

merely a suggestion and discussion of a trade in – not an offer by Chrysler to provide Morrow a new truck with a new warranty.

Even assuming the facts as true, the most important aspect of this Court's reliance on this suggestion is that there is no fact in the record to show the employee of the service department of Akins had either implied nor express authority to act on behalf of either Akins nor Chrysler. There is no writing anywhere to suggest this was a bona fide offer. There is no fact reflecting that prior to Morrow's deposition that either Akins nor Chrysler even knew about the suggestion made by the employee.

In fact, Chrysler's CAIR Report stated Morrow's attorney requested the truck be bought back. There is no record that Chrysler responded with any offer of a trade in. There is no "communication" between Chrysler and Akins to this effect.

There was no authority provided by any principal for the employee/agent to submit the offer. There is no fact to support the inference that Chrysler bestowed agency on the service department employee of Akins.

The Alabama Supreme Court assumed facts not in the record in reaching its conclusion. Notwithstanding the above, there is no fact to indicate that the alleged conversation occurred within the 30-day period of the express warranty.

> "[9] As this Court has held, "the existence and scope of an agency relationship are questions of fact to be determined by the jury." *Standard Plan, Inc. V. Tucker,* 582 So.2d 1024, 1029 (Ala.1991). Whether the agency existed is, we conclude, a question for a jury to decide."
> *Lee v Yes of Russellville, Inc.*, 784 So.2d 1022, 1028 (Ala.2000).

> [3] Wally's presented no substantial evidence to support a finding that Thomason had apparent authority to act as Intergraph's agent. Even if Thomason held himself out to be an agent of Intergraph and Coile relied on Thomasons' promise regarding the exclusive contract, such representations by Thomason could not create apparent authority. An agent's apparent authority must be based upon the conduct of the alleged principal and not that of the

alleged agent. *Secor Bank v. Bailey*, 596 So.2d 900, 901 (Ala.1992); *Gray v. Great American Reserve Ins. Co.*, 495 So.2d 602, 607 (Ala.1986); *Johnson v. Shenandoah Life Ins. Co.*, 291 Ala. 389, 394, 281 So.2d 636, 641 (1973)."
Wally's Inc. V Intergraph Corp., 727 So.2d 34, 37, 38 (Ala.1998).
Malmberg v. American Honda Motor Co., Inc., 644 So.2d 888, 891 (Ala.1994).

II. THE ALABAMA SUPREME COURT DISREGARDED THE SUBSTANTIAL FACTS SUPPORTING FAILURE OF ESSENTIAL PURPOSE UNDER PETITIONER'S EXPRESS AND IMPLIED WARRANTY CLAIM.

"Pettibone argues that our decisions in *Ag-Chem Equipment*, supra, and *Belcher v. Versatile Farm Equip. Co.*, 443 So.2d 912 (Ala. 1983), mandate a judgment in its favor. Pettibone argues that those two cases stand for the proposition that an offer by a warrantor to fix the product under warranty, and/or the failure of the customer to bring the product in for repair, is always sufficient to defeat the "failure of essential purpose" claim. However, our reading of the cases shows us that neither case stands for this proposition urged by the defendant, but that in fact each of those cases supports Miller's contention that he should have been allowed to submit his express warranty claim to the jury.

The specific holding in *Ag-Chem* was that the warrantor had complied with the terms of its warranty by offering to rebuild the engine under warranty. The plaintiff in that case could not claim that the warranty had failed of its essential purpose, because he never gave the warrantor the chance to comply with the limited warranty..."
"...In both cases, our holdings focused on the fact that the plaintiff himself had breached the warranty in some way. In this case, Miller is claiming that Pettibone did not comply with its limited warranty because it did not properly fix the hydrostat within a reasonable time, thus causing the limited warranty to fail. Unlike the plaintiff in *Ag-Chem*, Miller did

> try to have his product fixed, on numerous occasions, and Pettibone had ample opportunities to repair the machine "within a reasonable time." Whether Pettibone did repair it "within a reasonable time," or could have done so had Miller submitted the hydrostat for repair, is a question of fact for the jury."
> *Ex Parte Miller*, 693 So.2d 1372, 1378, 1379, (Ala. 1997).

The Petitioner's truck was presented for the jerking and bucking within the warranty. There was no fix until four to six months later of which Morrow was not aware. Morrow took the truck back on two separate occasions and neither Chrysler nor Akins fixed the problem notwithstanding that a fix did become available. Morrow's actions did not preclude the repair being made. Therefore, Morrow proved failure of essential purpose.

III. THE ALABAMA SUPREME COURT DISREGARDED THE SUBSTANTIAL FACTS SUPPORTING IMPLIED WARRRANTY OF MERCANTIBILITY.

Morrow's truck had three different defects; the first was repaired; the second two Chrysler nor Akins had no repairs for (jerking and bucking and fifth gear) at the time the problems presented).

Morrow presented evidence of the dangerousness of the jerking and bucking through his testimony and through Chrysler and Akins experts – Mr. Traylor and Mr. Campbell. This was undisputed. The fifth gear problem rendered the truck unfit for its purposes. Morrow could not drive the vehicle more than fifty to fifty-five miles per hour on the interstate in fourth gear pulling his trailer. This was not what the truck was designed for.

Morrow bought the truck to haul his forty-foot trailer. He parked the truck and could no longer use the truck for pulling the trailer at sixty-seven thousand miles six months after he purchased the truck because it was dangerous. He only used the truck for personal use (non-business) until February 2000, when he finally had no other choice financially.

As Justice Johnstone notes in his dissent at pages 13-16 of Appendix C, that Morrow presented sufficient facts to support this claim.

IV. THAT WITH ALL DUE RESPECT, THE ALABAMA SUPREME COURT REVIEWED THE EVIDENCE MORE FAVORABLY TO CHRYSLER AND AKINS IN REACHING ITS CONCLUSION; THEREBY NOT ONLY IGNORING PRECEDENT, BUT IN SUBSTITUTING ITS JUDGMENT AND INTERPRETATION OF THE FACTS TO THAT OF THE JURY, THEREFORE, THE ALABAMA SUPREME COURT HAS INFRINGED ON MORROW'S RIGHT TO TRIAL BY JURY AS GUARANTEED UNDER THE SEVENTH AND FOURTEENTH AMENDMENTS.

> "[4, 5] The Fourteenth Amendment provides that "[n]o state shall...deny to any person within its jurisdiction the equal protection of the laws." The United States Supreme Court has addressed the constraints placed on the judiciary in reviewing an equal-protection challenge of this nature. In *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982), the Court stated:
>
> "The Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike." *F.S. Royster Guao Co. V. Virginia,* 253 U.S. 412, 415 [40 S.Ct. 560, 64 L.Ed. 989] (1920). But so too, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas,* 310 U.S. 141, 147 [60 S.Ct. 879, 84 L.Ed. 1124] (1940)."
>
> *Jefferson County v Richards*, 805 So.2d 690, 698 (Ala. 2001).
>
> "[2-4] The basic tenet of the equal protection clause is not that all persons must be treated equally, but rather that all persons *similarly situated* must be treated equally. See *Hayes v. Missouri*, 120 U.S. 68, 7 S.Ct. 350, 30 L.Ed. 578 (1887).

> In this case, there is no suspect class nor any fundamental right involved."...
> *Eagerton v. Gulas Wrestling Enterprises*, Ala. 406 So.2d 366,370.

> "[5,6] The essence of the theory of equal protection of the laws is that all similarly situated be treated alike. *City of Hueytown v. Jiffy Chek Co.* 342 So.2d 761 (Ala.1977)."
> *City of Birmingham v. Stacy Williams Co., Inc.*, Ala., 356 So.2d 608, 611.

Because the Alabama Supreme Court construed the facts more favorably toward Chrysler and Akins, the Court ignored its own standard of review and precedent of the Court's prior opinions which applied to all others similarly situated under an Alabama Supreme Court Motion for Judgment as a Matter of Law. The Alabama Supreme Court, therefore, treated Morrow differently and thereby invaded the province of the jury in violating Morrow's right to trial by jury as guaranteed under the Seventh and Fourteenth Amendments to the United States Constitution.

V. THE DECISION CONFLICTS WITH THE UNITED STATES SUPREME COURT AND OTHER COURT'S DECISIONS AND TO SUFFICIENCY ISSUES FOR SETTING ASIDE A JURY VERDICT. (Supreme Court Rule 10(b) and 10(c), thereby violating Petitioner's due process and equal protection rights.

> "If facts and inferences point overwhelmingly in favor of one party, such that reasonable people could not arrive at contrary verdict, then motion for judgment as matter of law is properly granted, but, conversely, if there is substantial evidence opposed to motion such that reasonable people, in exercise of impartial judgment, might reach differing conclusions, then such motion is due to be denied and case is properly submitted to jury. Fed. Rules Civ. Proc. Rule 50, 28 U.S.C.A.; CA 11 (Ala.) 1997).
> *Combs v. Plantation Patterns*, 106 F.3d 1519, certiorari denied 118 S.Ct. 685, 522 U.S. 1045, 139 L.Ed.2d 632.

"Court, though it remains ultimately responsible for upholding the law applicable to the facts found, cannot substitute its view for that of jury when to do so would be effective denial of right to trial by jury. U.S.C.A. Const. Amend. 7.—*Connell v. Sears Roebuck & Co.*, 722 F.2d 1542. C.A. Fed. (Ala.) 1983).

"[2, 3] "Due [p]rocess...entitles a person to an impartial and disinterested tribunal in both civil and criminal case." *Marshall v. Jerrico, Inc.* 446 U.S. 238, 242, 100 S.Ct. 1610, 1613, 64 L.Ed.2d 182 (1980). Trial before such a tribunal "helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law." *Id.*
Ex Parte James, 713 So.2d 869, 874 (Ala. 1997)

"...A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623..."
Evans v. State Bd of Chiropractic Examiners, 662 So.2d 262, 264 (Ala.Civ.App. 1994)

"Where the record does not support the judgment – due process is implicated and the judgment is void."
Vachon v. New Hampshire, 414 U.S. 478, 94 S.Ct 664, 38 L.Ed 2d. 666 (1974). See also application in a civil proceeding *Zenith Radio Corp. v. Matsushita Electric Industrial Co., LTD.*, et. al, 723 F.2d, 23B, 304.

The standard of review for Rule 50 Motions for judgment as a matter of law is the same under both Federal Court rules and State of Alabama Rules of Civil Procedure. The Alabama Supreme Court violated the standards of both Federal and State Courts in violating Petitioner's right to a jury trial.

VI. THIS COURT MUST TAKE JURISDICTION OF THIS CLAIM AS TO REFRAIN FROM EXERCISING JURISDICTION IN THIS CASE WOULD LEAVE PETITIONER NO AVENUE TO REVIEW THE VIOLATION OF HIS CONSTITUTIONAL RIGHT.

The usurpation of a federally protected right by the Alabama Supreme Court would go unchecked should this Court refrain to act. There would be no avenue of review; no check or balance for Petitioner (or other persons similarly situated) to remedy this type wrong engaged in by a state appellate court.

CONCLUSION

That Petitioner has shown that he presented substantial evidence to the jury to support both his express and implied claims of warranty pursuant to the jury instructions made at trial.

With all due respect to the Alabama Supreme Court, the Court ignored its own standard of review and treated Petitioner differently from all others in reviewing Motions for Judgment as Matter of Law. Therefore, where there was sufficient evidence to support the jury verdict, the Alabama Supreme Court invaded the province of the jury in reversing the verdict of the jury. This was plain and palpably wrong, unjust and deprived Petitioner of his right to trial by jury and Petitioner's due process and equal protection rights as guaranteed under the United States and Alabama Constitutions.

Therefore, Petitioner prays that his Petition for Writ of Certiorari be granted and that the decision of the Alabama Supreme Court reversing and vacating his jury award and judgment for attorney fees be reversed and remanded accordingly.

This Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Donald G Madison

DONALD G. MADISON
Attorney for Petitioner David Morrow
418 Scott Street
Montgomery, Alabama 36104
(334) 263-4800

November 23, 2004.

APPENDIX A

objection is a general one, and that would be we object to any charge on what was brought up in the judgment as a matter of law. We felt like none of the breach of warranty issues should have went to the jury. That's the only objection.

THE COURT: Anything else?

(Jury Deliberating.)

(The Jury enters the courtroom.)

THE COURT: Be seated. I'm just glad you have a verdict. We have had a rash of juries that couldn't make up their minds so I appreciate y'all making up your minds. I have been handed this verdict and I will read it. We, the Jury, find the issues in favor of the

Plaintiff and against Defendant Akins Chrysler/Plymouth of Winder, Georgia, and Chrysler Corporation and assess damages in the amount of ninety-three thousand five hundred dollars. Is that your verdict?

THE FOREPERSON: Yes.

APPENDIX B

IN THE CIRCUIT COURT
MONTGOMERY COUNTY, ALABAMA

DAVID MORROW,	*	
	*	
Plaintiff,	*	
	*	
Vs.	*	CIVIL ACTION
	*	NO. 98-2733
AKIN CHRYSLER/	*	
PLYMOUTH OF	*	
WINDER, GEORGIA, et al.,	*	
	*	
Defendants.	*	

FINAL ORDER

This cause came before the Court on the Plaintiff's motion for an award of attorney fees and for costs; the Defendants move for new trial or JNOV. Addressing the Defendants' motions first, these motions are denied. The case went to the jury on the counts of breach of express warranty and breach of implied warranty. The Court dismissed Plaintiff's fraud counts prior to trial and the Plaintiff abandoned his claim for breach of the implied warranty of fitness for a particular purpose.

Shortly after purchasing the vehicle, and well within the express warranty period, Plaintiff began experiencing problems with the truck including severe jerking and bucking. The truck also suffered from a fifth-gear nut defect which did not manifest itself until after the thirty-six thousand mile limitation on the express warranty had expired. While it is undisputed that these problems were not corrected until long after Plaintiff complained of them, Defendants complain that they were not given a sufficient opportunity to correct the problems. It is undisputed that the

solution for the "bucking and jerking" and the fifth-gear nut problems were not developed by Chrysler engineers until months after the Plaintiff first complained of the problems.

Accordingly, even if the Plaintiff had returned the vehicle on a weekly basis to the dealership, the undisputed evidence is that Defendants were unable to fix the problem until months later. The law does not compel a futile act. Since the vehicle could not be repaired, the Plaintiff contends, and the jury apparently agreed, that the warranties failed of their essential purpose.

Turning to the Plaintiff's motion for an award of attorney's fees and costs, this Court previously held that an award of attorney fees was sanctioned by Section 8-20-8 of the Code of Alabama. Defendant forthrightly does not contest the number of hours claimed by Plaintiff but does challenge the wisdom of some of the battles allegedly initiated by the Plaintiff. The discovery phase of this case was hotly contested, complete with motions for sanctions and the appointment of a special master to resolve ongoing discovery disputes. Fortunately, the trial was rather anticlimactic given the previous history.[1] The Defendants' initial objection is that Plaintiff engaged in extensive discovery futilely trying to bolster his fraud claims which were dismissed prior to trial. Since the fraud claims were dismissed, the argument goes, the Plaintiff cannot be deemed the prevailing party on the fraud issues.

Plaintiff sought to develop evidence that Chrysler knew its truck suffered from the "bucking and jerking" problem and the fifth-gear nut defect, but suppressed this information. While the suppression count did not impress the Trial Court, the evidence gleaned pursuant to that discovery cannot be dismissed as irrelevant. Proof that these problems were known to Chrysler impacted on Defendants' misuse defense and bolstered Plaintiff's credibility. Discovery also demonstrated that Defendants were

---

[1]The case was filed in 1998 and, thus, was litigated for almost five years. It should be noted that the trial judge inherited the file in January of this year.

unable to repair these problems when Plaintiff reported these defects. Accordingly, the Court cannot say that the hours expended on this quest for information were unreasonable.

The Court does find that the Plaintiff unreasonably sought a summary judgment in his favor on the fraud claims, a rare if not unprecedented strategy. At a hearing on June 11, 2003, the Plaintiff agreed that the following hours since they were expended in pursuit of the Plaintiff's summary judgment:[2]

	HOURS	DATE
1.	29	11/29 - 12/6/02
2.	18.7	1/17 - 2/27/03
3.	11.6	3/5/03
4.	8.7	2/01 - 1/18/01

TOTAL: 68 HOURS

Accordingly, the Court finds that Plaintiff is entitled to be reimbursed for 602.7 hours of attorney time at an hourly wage rate of two hundred dollars an hour for an award of one hundred and twenty thousand five hundred forty dollars ($120,540) in attorney fees for time expended by Don Madison.

Plaintiff also seeks attorney fees for time expended by Adrian Johnson. His fee request reflects eleven hours spent on research for Plaintiff's motion for summary judgment, and as discussed previously, this time is disallowed. In addition, it is not reasonable to charge attorney time for such mundane tasks as file organization and travel to the airport to pick up a plane ticket. Thus, Mr. Johnson's time is reduced by fifteen hours for an award of twenty hours at a rate of one hundred and seventy-five dollars an hour which totals three thousand five hundred dollars ($3,500). The total attorney fee awarded to Plaintiff is one hundred and twenty-four thousand and forty dollars.

---

[2]It should be noted that Plaintiff disagrees with the Court's decision not to award the attorney fee on these hours.

Plaintiff also seeks deposition costs. Deposition costs are allowed to Plaintiff for the depositions of Bower and Cummins. The costs for the depositions in Detroit are not allowed since these depositions were not used at trial. Plaintiff also seeks to tax the cost of the special master to the Defendants. This Court had previously split the cost between the litigants. The Court declines to revisit this issue and this request is denied.

DONE and ORDERED this 27 day of June, 2003.

TRUMAN M. HOBBS, JR.
CIRCUIT JUDGE

cc: James Walsh
Don Madison

APPENDIX C

Notice: This opinion is subject to formal revision before publication in the advance sheets of **Southern Reporter**. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 242-4621), of any typographical or other errors, in order that corrections may be made before the opinion is printed in **Southern Reporter.**

SUPREME COURT OF ALABAMA
OCTOBER TERM, 2003-2004

1021866

DaimlerChrysler Corporation and Akin Ford/Chrysler, Inc. of Winder, Georgia

v.

David Morrow

1021977

David Morrow

v.

DaimlerChrysler Corporation and Akin Ford/Chrysler, Inc. of Winder, Georgia

Appeals from Montgomery Circuit Court
(CV-98-2733)

1021866; 1021977

WOODALL, Justice.

DaimlerChrysler Corporation ("Chrysler") and Akin Ford/Chrysler, Inc. of Winder, Georgia ("Akin"), appeal from a judgment in favor of David Morrow awarding compensatory damages and attorney fees in Morrow's action against Chrysler and Akin alleging breach of express and implied warranties. Morrow cross-appeals from a summary judgment for Chrysler and Akin with respect to his fraudulent-suppression claim. In the appeal (case no. 1021866), we reverse and remand. In the cross-appeal (case no. 1021977), we affirm.

This dispute arose following Morrow's purchase from Akin of a Dodge Ram 3500 pickup truck manufactured by Chrysler ("the truck"). Morrow purchased the truck on March 27, 1997, for use in his "less than truckload freight" business. Specifically, that business involved the hauling of commercial signs on a trailer that was to be pulled by the truck. Morrow had several trailers, ranging in length from 16 feet to approximately 40 feet.

When he purchased the truck, Morrow received a written warranty from Chrysler. The warranty provided, in pertinent part, that it "cover[ed] the cost of all parts and labor needed to repair any defective item on [the] truck -- that is, defective in material, workmanship, or factory preparation." The warranty began when Morrow took delivery of the truck and expired at 36 months or 36,000 miles, whichever occurred first.

In early May 1997, "Morrow began noticing that the truck exhibited a bucking and jerking sensation when you were driving around 55 miles per hour." Morrow's brief, at 7. According to Morrow, the problem was "intermittent," and occurred only when he was pulling his approximately 40-foot trailer.

On June 17, 1997, after he had driven the truck 18,331 miles, Morrow took it to Akin, complaining of the jerking and bucking. Akin was not able to fix the problem on that occasion. However, according to Morrow, Akin's shop manager told him that Chrysler was "working on a solution and that as soon as he found out something, he would let [Morrow] know." Morrow testified that

neither Chrysler nor Akin ever advised him as to how, or if, the jerking or bucking problem could be alleviated.

Before he had driven the truck 36,000 miles and within the three-year warranty period, Morrow again contacted Akin, because the truck continued to buck and jerk. In an attempt to resolve the problem, Akin offered to replace the truck with a new truck covered by a new warranty. However, Morrow rejected that offer, because, as he put it, there was "no guarantee that a new Dodge truck would not do the same thing as the one [he] already owned."

Morrow continued to use the truck in his business until approximately April 1998. By that time, the truck had been driven more than 100,000 miles. He then began to rent a tractor-trailer rig to use in his sign-hauling business. Subsequently, Morrow used the truck on two or three additional business trips; he primarily used the truck as his personal vehicle. By March 2003, when the case was tried, Morrow had driven the truck approximately 248,000 miles.

On October 27, 1998, Morrow sued Chrysler and Akin. Morrow's complaint included a claim against Chrysler alleging a breach of express warranty, a claim against Akin alleging a breach of an implied warranty of merchantability, and a claim against both Chrysler and Akin alleging fraudulent suppression. Also, Morrow sought attorney fees under § 8-20-8, Ala. Code 1975, a part of the Motor Vehicle Franchise Act, § 8-20-1 et seq, Ala. Code 1975 ("the Act").

After considerable discovery, Chrysler and Akin filed a motion for a summary judgment, which the trial court granted with respect to Morrow's fraudulent-suppression claim. Ultimately, the case was tried before a jury. Chrysler and Akin timely filed a motion for a judgment as a matter of law ("JML"), which the trial court denied. The case was submitted to the jury on Morrow's claims that Chrysler had breached its express warranty and that Akin had breached the implied warranty of merchantability. The jury returned a general verdict in the amount of $93,500 against Chrysler and Akin.

After Chrysler and Akin renewed their motion for a JML and, alternatively, moved for a new trial. Also, Morrow moved for an award of attorney fees under the Act. On June 27, 2003, the trial

court denied Chrysler and Akin's post judgment motions and granted Morrow's motion, awarding $120,540 in attorney fees. Chrysler and Akin appealed, and Morrow cross-appealed.

I. The Appeal

Chrysler and Akin contend the trial court erred in denying their motion for a JML made after the return of the verdict.

We have clearly stated the standard for appellate review of a trial court's ruling on a motion for a JML made after the return of the verdict:

> "'The standard of review applicable to a ruling on a [renewed] motion for [a JML] is identical to the standard used by the trial court in granting or denying a motion for [a JML]. Thus, in reviewing the trial court's ruling on the motion, we review the evidence in the light most favorable to the nonmovant, and we determine whether the party with the burden of proof has produced sufficient evidence to require a jury determination."...
>
> "...
>
> "...In ruling on a [renewed] motion for a [JML], the trial court is called upon to determine whether the evidence was sufficient to submit a question of fact to the jury; for the court to determine that it was, there must have been "substantial evidence" before the jury to create a question of fact. "[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved."'
>
> "American Nat'l Fire Ins. Co. v. Hughes, 624 So.2d 1362, 1366-67 (Ala.1993) (citations omitted)."
>
> Mack Trucks, Inc. v. Witherspoon, 867 So.2d 301, 308 (Ala. 2003).

Akin argues that, despite "the jerking and bucking 'defect' ...[the] truck is merchantable as a matter of law, and the trial court erred by submitting the implied warranty of merchantability claim to the jury." Akin's brief, at 21-22. In response, Morrow argues that "the truck was so dangerous as to the jerking and bucking as to not be merchantable." Morrow's brief, at 48. Thus, we must determine whether Morrow produced substantial evidence indicating that the truck was not merchantable.

The implied warranty of merchantability is found in Ala. Code 1975 § 7-2-314. "[A] warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." § 7-2-314(1). "Goods to be merchantable must be at least such as...[a]re fit for the ordinary purposes for which such goods are used." § 7-3-314(2)(c). "[T]he term [merchantability] means that good sold carries with it an inherent soundness which makes that good suitable for the purpose for which it was designed." Agri-Business Supply Co. v. Hodge, 447 So.2d 769, 773 (Ala. Civ. App. 1984).

Morrow contends he offered substantial evidence in support of his breach-of-implied-warranty claim. Specifically, he points to the bucking and jerking problem, which, according to his evidence, damaged the truck and caused it to be dangerous. However, other undisputed evidence belies his contention.

First, the problem was, by Morrow's own admission, "intermittent"; it occurred only when he was pulling his longest trailer at "around 55 miles per hour." Also, despite the problem, Morrow used the truck in his business for approximately one year, driving it more than 100,000 miles. Subsequently, Morrow used the truck on two or three additional business trips, primarily using the truck as his personal vehicle. Ultimately, by the time of trial, Morrow had driven the truck approximately 248,000 miles. In our opinion, Morrow's extensive use of the truck since its delivery precludes Morrow's claim that the truck was not fit for the ordinary purposes for which such trucks are used. See Terrell v. R & A Mfg. Partners, Ltd., 835 So.2d 216, 229 (Ala. Civ. App. 2002). Therefore, the trial court erred in denying Akin's renewed motion for a JML with respect to Morrow's breach-of-implied-warranty claim.

With respect to Morrow's breach-of-implied-warranty claim, Morrow and Chrysler agree that the legal principles relevant to that claim were stated by this Court in Lipham v. General Motors Corp., 665 So.2d 190, 192 (Ala. 1995):

> "In order to establish a breach of an express warranty, the plaintiff must show that "the warranty failed of its essential purpose"; that either the dealer refused to repair or replace the malfunctioning component, or failed to do so "within a reasonable time." Ag-Chem Equip. Co. v. Limestone Farmers Co-op., Inc., 567 So.2d 250 (Ala. 1990)."

Therefore, the relevant inquiry is whether Morrow offered substantial evidence indicating that Chrysler's warranty failed of its essential purpose.

Morrow argues that his breach-of-express-warranty claim was supported by substantial evidence, because "[t]he undisputed evidence is that the truck has jerked and bucked [since] two and one-half months after [he] purchased the vehicle and at 18,331 miles [, and] [n]either Akin nor Chrysler repaired the truck thereafter within a reasonable time." Morrow's brief, at 48. However, it is undisputed that Chrysler, within a few months after the jerking and bucking began, and before the truck had been drive 36,000 miles, offered to replace the truck with a new truck covered by a new warranty. Morrow rejected the offer because there was "no guarantee that a new Dodge truck would not do the same thing." We simply cannot conclude, under those circumstances, that Chrysler's express warranty "failed of its essential purpose." See Feil v. Wittern Group, Inc., 784 So.2d 302, 311 (Ala.Civ. App. 2000) ("[W]e conclude that Feil did not present substantial evidence indicating that the express warranties provided by Continental and VendNet failed [of] their essential purpose. In fact, Feil himself testified that neither Continental nor VendNet ever failed or refused to supply him with replacement parts that he needed during the warranty period.") See also Ag-Chem Equip. Co. v. Limestone Farmers Coop., Inc., 567 So.2d 250, 252 (Ala. 1990) (holding that an express warranty did not fail of its essential purpose where purchaser never tendered an engine to the seller so that the engine could be repaired, because,

according to the purchaser, it had experienced problems with another rebuilt engine and did not want the engine in question rebuilt). Therefore, the trial court erred in denying Chrysler's renewed motion for a JML with respect to Morrow's breach-of-express-warranty claim.

For the foregoing reasons, the judgment in favor of Morrow and against Chrysler and Akin is reversed, and the cause is remanded for the entry of an order consistent with this opinion.

II The Cross-Appeal

Morrow contends the trial court erred in entering a summary judgment for Chrysler and Akin with respect to his fraudulent-suppression claim. As understood by Chrysler and Akin, as well as this Court, the basis of that claim "seems to [be] that Chrysler and/or Akin intentionally and actively concealed problems that had occurred in certain other Dodge Ram 3500's." Chrysler and Akin's reply brief, at 13. A brief analysis of Morrow's argument demonstrates that his contention is without adequate support.

The statutory basis for a fraudulent-suppression claim is §6-5-102, Ala. Code 1975, which provides:

> "Suppression of a material fact which the party is under an obligation to communicate constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case."

(Emphasis added.) Citing § 6-5-102, Morrow argues that Chrysler and Akin had "a duty to disclose" certain similar problems that had occurred in other Dodge Ram trucks like his. Morrow's brief, at 65. However, Morrow cites no authority supporting the recognition of a duty to disclose under the facts of this case. Indeed, as Chrysler and Akin point out, "[t]he cases on which Morrow relies to support his theory of fraud ... rejected the argument that there exists some generalized duty to disclose similar problems occurring in other vehicles." Chrysler and Akin's reply brief, at 13-14. See Mason v. Chrysler Corp., 653 So. 2d 951 (Ala. 1995); McGowan v. Chrysler Corp., 631 So. 2d 842 (Ala. 1993). Thus, this Court must conclude that Morrow has not

demonstrated that the trial court erred in entering a summary judgment with respect to his fraudulent-suppression claim.

That summary judgment is affirmed.

1021866 -- REVERSED AND REMANDED.

Houston, See, Lyons, Brown, Harwood, and Stuart, JJ., concur.

Johnstone, J., concurs in part and dissents in part.
1021977 -- AFFIRMED.

Houston, See, Lyons, Brown, Johnstone, Harwood, and Stuart, JJ., concur.

JOHNSTONE, Justice (concurring in part and dissenting in part).

I concur in the main opinion insofar as it reverses the denial of the defendant manufacturer's motion for a judgment as a matter of law ("JML") on the plaintiff's express-warranty claim and insofar as the main opinion affirms the summary judgment against the plaintiff on his fraudulent-suppression claim. I respectfully dissent from the main opinion insofar as it reverses the denial of the defendant dealer's motion for JML on the plaintiff's claim for breach of implied warranty of merchantability.

On the plaintiff's implied-warranty-of merchantability claim against the defendant dealer, the main opinion identifies the dispositive issue as "whether [the plaintiff] Morrow produced substantial evidence indicating that the truck was not merchantable." The dealer admits that the jerking and bucking was enough of a problem common to trucks like the plaintiff's that the defendant manufacturer Chrysler issued a "Technical Service Bulletin" about the problem. The plaintiff testified that, when he demonstrated the jerking and bucking to the dealer's shop foreman or shop manager Rick Bower on June 17, 1997, Bower said to the plaintiff:

> "[T]his is the sixth or seventh one I have seen in here doing this and we have tried to put stiffer springs on the accelerator linkage and so far nothing has worked but we've made Chrysler aware that we're having a problem."

The defendants' expert George Thomas Traylor, having ridden in the plaintiff's truck to experience the jerking and bucking described it as "very severe." Traylor agreed that "it [is] hard to even carry on a conversation while it is going on." Traylor explained, "[I]t shakes really bad." William Campbell, an engineer in the power-train division of Chrysler, described the jerking and bucking this way:

> "It is a very unsettling experience. It gets started with a rapid throttle movement and a back-off. Then it just goes into a resonance on its own. If you aren't strapped in, you can get thrown up and hit your head on the rood, or I can. I'm kind of tall."

On February 13, 1997, about six weeks before the plaintiff bought his truck, Chrysler posted for its dealers a "STAR hotline" e-mail message which described an incident with a Chrysler truck pulling a "fifth wheel" trailer, generally the same configuration as the plaintiff's, in pertinent part as follows:

> "Buck and surge at cruising speed pulling a fifth wheel trailer, 3.54 ratio gear in fifth gear. Twelve thousand pounds GVW of trailer. The trailer was loaded. The bucking caused the trailer to come unhooked from the truck. The bed and tailgate heavy damage. Happens while cruising. Steady speed. Fifth wheel is approximately four inches forward of axle. Truck has camper....[R]esolution package: Transient customer. No fix at this time."

Referring to his own truck, the plaintiff testified:

> "Somewhere along the line, I noticed that the fifth wheel -- the goose neck ball that was mounted in the bed of the truck

> ...[,] where the nut was welded into the brace under there, that the weld was broken all the way around the nut."

The plaintiff, apparently without objection, attributed this dangerous condition to the jerking and bucking. Thereafter, the weld broke again because of the jerking and bucking. Morrow testified:

> "Well, the first particular occasion I carried it in [to Airport Trailer Sale], they rewelded the nut back under the bottom of it. Then we were inspecting it again and noticed the weld had broken again. That's when I pretty much just said, well this has gotten to the point where I'm about to get somebody killed when the trailer leaves the back of this truck so I just parked the truck and quit using it."

All of the foregoing, considered, as we must consider it, in the light most favorable to the judgment-winner, the plaintiff, constitutes substantial evidence that the truck was not merchantable when the plaintiff bought it. The record contains evidence that supports a reasonable inference that the plaintiff's continued use of the truck was caused by financial necessity. Thus, the evidence of continued use cannot nullify the plaintiff's evidence of nonmerchantability. Likewise, the evidence of continued use cannot prove as a matter of law that the truck was merchantable, as the main opinion holds.

APPENDIX D
IN THE SUPREME COURT OF ALABAMA

August 27, 2004

1021866

DaimlerChrysler Corporation and Akin Ford/Chrysler, Inc. of Winder, Georgia v. David Morrow (Appeal from Montgomery Circuit Court: CV-98-2733).

ORDER

IT IS ORDERED that the application for rehearing filed in this cause is overruled.

Application for Rehearing Overruled. No Opinion.

WOODALL, J. - Houston, See, Lyons, Brown, Harwood, and Stuart, JJ., concur. Johnstone, J., dissents.

APPENDIX E
IN THE SUPREME COURT OF ALABAMA

August 27, 2004

1021977

David Morrow v. DaimlerChrysler Corporation and Akin Ford/Chrysler, Inc. of Winder, Georgia (Appeal from Montgomery Circuit Court: CV-98-2733).

ORDER

IT IS ORDERED that the application for rehearing filed in this cause is overruled.

Application for Rehearing Overruled. No Opinion.

WOODALL, J. - Houston, See, Lyons, Brown, Johnstone, Harwood,and Stuart, JJ., concur.